

April 2007

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## ***Evans v. the United Kingdom [GC] - 6339/05***

Judgment 10.4.2007 [GC]

### **Article 8**

#### **Article 8-1**

##### **Respect for private life**

Requirement of father's consent for the continued storage and implantation of fertilised eggs: *no violation*

*Facts:* In July 2000 the applicant and her partner J. started fertility treatment. In October 2000, during an appointment at the clinic, the applicant was diagnosed with a pre-cancerous condition of her ovaries and offered one cycle of *in vitro* fertilization (IVF) treatment prior to the surgical removal of her ovaries. During the consultation she and J. were informed that they would each need to sign a form consenting to the treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), it would be possible for either of them to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus. The applicant considered whether she should explore other means of having her remaining eggs fertilised, to guard against the possibility of her relationship with J. ending. J. reassured her that that would not happen. In November 2001 the couple attended the clinic for treatment, resulting in the creation of six embryos which were placed in storage. Two weeks later the applicant underwent an operation to remove her ovaries. She was told she would need to wait for two years before the implantation of the embryos in her uterus. In May 2002 the relationship between the applicant and J. ended and subsequently, in accordance with the 1990 Act, he informed the clinic that he did not consent to her using the embryos alone or their continued storage. The applicant brought proceedings in the High Court seeking, among other things, an injunction to require J. to give his consent. Her application was refused in October 2003, J. having been found to have acted in good faith, as he had embarked on the treatment on the basis that his relationship with the applicant would continue. In October 2004 the Court of Appeal upheld the High Court's judgment. Leave to appeal was refused.

The applicant complained that domestic law permitted her former partner effectively to withdraw his consent to the storage and use of the embryos, thus preventing her from ever having a child to whom she was genetically related.

*Law:* Article 2 – For the reasons given by the Chamber in its judgment of 7 March 2006, namely that the issue of when the right to life began came within the State's margin of appreciation (see Information Note no. 84), the embryos created by the applicant and J. did not have a right to life.

*Conclusion:* no violation (unanimously).

Article 8 – *Nature of the rights:* "Private life" incorporated the right to respect for both the decisions to become and not to become a parent. However, the applicant had not complained that she was in any way prevented from becoming a mother

in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes. Her complaint was, more precisely, that the consent provisions of the 1990 Act had prevented her from using the embryos she and J. had created together, and thus, given her particular circumstances, from ever having a child to whom she was genetically related. That more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, fell within the scope of Article 8. The dilemma central to the case was that it involved a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person's interest was entirely irreconcilable with the other's, since if the applicant was permitted to use the embryos, J. would be forced to become a father, whereas if J.'s refusal or withdrawal of consent was upheld, the applicant would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated. The legislation also served a number of wider, public interests, such as upholding the principle of the primacy of consent and promoting legal clarity and certainty.

*Positive obligation or interference:* It was appropriate to analyse the case as one concerning positive obligations. The principal issue was whether the legislative provisions as applied in the case struck a fair balance between the competing public and private interests involved. In that regard, the findings of the domestic courts that J. had never consented to the applicant using the jointly created embryos alone were accepted.

*Margin of appreciation:* The issues raised by the case were undoubtedly of a morally and ethically delicate nature. In addition, there was no uniform European approach in the field. Certain States had enacted primary or secondary legislation to control the use of IVF treatment, whereas in others that was a matter left to medical practice and guidelines. While the United Kingdom was not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices were applied elsewhere in Europe. It could not be said that there was any consensus as to the stage in IVF treatment when the gamete providers' consent became irrevocable. While the applicant contended that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entailed that her Article 8 rights should take precedence over J.'s, it did not appear that there was any clear consensus on that point either. In conclusion, therefore, since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was no clear common ground amongst the Member States, the margin of appreciation afforded to the respondent State had to be a wide one and extend in principle both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it laid down in order to achieve a balance between the competing public and private interests.

*Compliance:* The remaining question, therefore, was whether, in the special circumstances of the case, the application of a law which permitted J. effectively to withdraw or withhold his consent to the implantation in the applicant's uterus of the embryos created jointly by them struck a fair balance between the competing interests. The fact that it had become technically possible to keep human embryos in frozen storage gave rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which might be substantial, to intervene between the creation of

the embryo and its implantation in the uterus. It was therefore legitimate and desirable for a State to set up a legal scheme which took that possibility of delay into account. The decision as to the principles and policies to be applied in this sensitive field was primarily for each State to determine. The 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate. It placed a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing. That had occurred in the applicant's case, and the applicant and J. had both signed the consent forms required by the law. However, the Act also permitted the gamete providers to withdraw their consent at any time until the embryo was implanted in the uterus. While the pressing nature of the applicant's medical condition had required her to make a decision quickly and under extreme stress, she had known, when she consented to have all her eggs fertilised with J.'s sperm, that they would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J. would be free to withdraw his consent to implantation at any moment. While the applicant had criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the absolute nature of the law was not, in itself, necessarily inconsistent with Article 8. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what had been described by the domestic courts as "entirely incommensurable" interests. Those general interests were legitimate and consistent with Article 8. Given these considerations, including the lack of any European consensus on the point, the Court did not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically-related child with her.

*Conclusion:* no violation (thirteen votes to four).

Article 14 – It was unnecessary to decide whether the applicant could properly complain of a difference of treatment as compared to another woman in an analogous position, since the reasons given for finding that there was no violation of Article 8 also afforded a reasonable and objective justification under Article 14.

*Conclusion:* no violation (thirteen votes to four).